IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL NO. 01-638-01
	:	
v.	:	CIVIL NO. 05-3016
	:	
CHARLES JOHNSON	:	

MEMORANDUM

BUCKWALTER, J. December 5, 2005

Petitioner has filed a § 2255 motion stating the following grounds:

1. Ineffective assistance of counsel on direct appeal; and

2. Appellate counsel failed to file certiorari with the Supreme Court concerning 4th Amendment violations.

The facts of this case are set forth on pages 2 through 7 of Respondent's brief, and adopted by reference thereto.

With regard to the alleged ineffectiveness on direct appeal, Petitioner argues first that counsel failed to raise a Sixth Amendment violation when that very issue had been argued at trial. This concerns Petitioner's argument that he was denied the right to confront the confidential informant (CI) at trial, when the trial court ruled that the government did not have to disclose the CI's identity because Petitioner could not prove a specific need for the disclosure. Appeal counsel did not raise this issue but did raise the trial court's ruling on the Petitioner's suppression motion.

With regard to appeal counsel's not raising this issue, the Respondent argues, correctly, that appellate counsel need not raise every non-frivolous issue on appeal.

The Respondent cites the following language from Smith v. Murray, 477 U.S. 527, 536 (1986):

> After conducting a vigorous defense at both the guilt and sentencing phases of the trial, counsel surveyed the extensive transcript, researched a number of claims, and decided that, under the current state of the law, 13 were worth pursuing on direct appeal. This process of "winnowing out weaker arguments on appeal and focusing on" those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy. Jones v. Barnes, 463 U.S. 745, 751-752 (1983). * * * But, as Strickland v. Washington made clear, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U.S., at 689.

Appellate counsel's not raising the CI confrontation issue on appeal was a reasonable one where the applicable law and the record in this case supported the trial court's decision.

Petitioner's second argument about failing to raise the § 924(e)(2) issue is, in his brief, really an argument about the interstate commerce requirement of § 924(g). In this regard, Petitioner claims the issue of interstate commerce was for the jury to decide. In this case, that is what happened. At N.T. 8/22/02 at p. 166, the trial court instructed the jury that the government must prove that possession of the weapon was in or effecting interstate commerce. In addition, Petitioner argues that the evidence was insufficient – an argument with no merit and one which reasonable appellate counsel would not raise.

Petitioner's third argument on lack of ineffective appeal counsel has to do with prior convictions. It is clear, initially, that Petitioner's prior drug convictions were serious drug offenses under 18 U.S.C. § 924(e). The government's recitation of the applicable Pennsylvania statute is correct. (*See* p. 19 of brief). Petitioner has pointed to a statute in Pennsylvania that imposes a mandatory minimum but which has no impact on the maximum sentence of 15 years for possession with intent to distribute, other than in certain instances imposing a mandatory minimum.

Petitioner next argues that only one of his robbery convictions counts because, in his words, "only one as charged with its defining language implies violence or threat of violence." (Petitioner's brief at p. 9)

The argument that Petitioner is making is essentially that "snatch and run" offenses such as two of the three robberies he was convicted of do not amount to a violent robbery. This argument was addressed by the Third Circuit in U.S. v. Cornish, 103 F.3d 302, 309 (3d Cir. 1997) as follows:

> Cornish was convicted of third degree robbery pursuant to 18 Pa.Cons.Stat.Ann. § 3701(a)(1)(v), which requires that in the course of committing a theft, a person "physically takes or removes property from the person of another *by force* however slight." 18 Pa.Cons.Stat.Ann. § 3701(a)(1)(v) (emphasis added). Based on a literal reading of the statute, the interpretation of § 3701 by the Pennsylvania Supreme Court, and this circuit's decisions in *Watkins* and *Preston*, we find that any conviction for robbery under the Pennsylvania robbery statute, regardless of the degree, has as an element the use of force against the person of another. We hold that Cornish's conviction for third degree robbery is a "violent felony" pursuant to 18 U.S.C. § 924(e)(2)(B)(i) and the district court erred in failing to apply the enhanced penalties of § 924(e).

As the government points out, even if only one prior robbery conviction of Petitioner would count, he nevertheless qualifies for enhancement with his two prior drug convictions. Counsel was not ineffective in not raising these prior conviction arguments on appeal.

Petitioner's second ground is not addressed in his brief and in light of the history of this case, would have no merit.

Finally, in his reply, Petitioner concedes that the issue of the government failing to file a Notice of Prior Conviction Under 21 U.S.C. § 851 was addressed in his direct appeal. (*See* p. 3 of Petitioner's reply). But, Petitioner claims, he is now advancing a claim of actual innocence. There is no evidentiary support for this claim.

An order follows.

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ORDER

AND NOW, this 5th day of December, 2005, upon consideration of Petitioner's habeas corpus motion under 28 U.S.C. § 2255 (Docket No. 58), the Government's Response thereto and Petitioner's Reply, it is hereby ORDERED that said motion is DENIED.

No certificate of appealability will issue since Petitioner has failed to make a substantial showing of the denial of any constitutional right.

BY THE COURT:

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RONALD L. BUCKWALTER, S.J.